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No. 01-375

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

YALE TIFFANY KOZINSKI,
Petitioner,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari
To The Appellate Division of the Superior Court,
State of California, County of Los Angeles

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Would trial of a minor infraction without the prosecutor's participation always deny the defendant due process?

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BRIEF IN OPPOSITION

On behalf of the respondent People of the State of California, Steve Cooley, the Los Angeles County District Attorney, respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the unpublished memorandum judgment of the Appellate Division of the Superior Court, State of California, County of Los Angeles filed May 2, 2001, under that court's case number BR40958.

JURISDICTIONAL DEFECTS

1. Certiorari Requires, But The Petition Lacks, A Federal Question Decided By The State Court

Kozinski has not attacked the constitutionality of any California statute; instead, to assert the Court's jurisdiction, he claims the state trial court denied him federal due process. See, 28 U.S.C. §1257(a). However, Kozinski did not properly raise

a federal due process violation in the state court that considered his appeal.

The state court's memorandum judgment recognized Kozinski's appellate contentions as:

> "1. The judgment should be reversed because there was no one present in court to represent the State of California.
> "2. Appellant's right to due process was denied because the trial judge performed the duties of the prosecuting attorney.
> "3. The trial court committed error in denying appellant's motion to dismiss.
> "4. There was insufficient evidence presented at trial to support the judgment." App. 2.

After noting these contentions, the memorandum judgment continued:

> "Appellant's first contention is contrary to settled California law. The California Supreme Court has held that a traffic trial may be conducted by a judge without the presence of a prosecuting attorney. 'From the foregoing we conclude that the trial court may call and question witnesses in the absence of a prosecutor. Such actions constitute neither a per se denial of due process nor transmute the judge into prosecutor.' (*People v. Carlucci* (1979) 23 Cal.3d 249, 256.) [¶] None of the remaining contentions asserted by appellant can be considered by this court . . . ." App. 2.

The memorandum judgment further explained that Kozinski had submitted an insufficient record to allow the state court to consider the remainder of his appellate contentions. App. 2-3.

Although Kozinski says he argued in his appeal "that the absence of a prosecutor denied him due process, in violation of

the United States Constitution," Petn. 4, he did not explicitly present such an argument, and cited no federal authorities, in the only brief considered by the state appellate court. Thus--since Kozinski did not adequately raise his federal claim for the state court's consideration, and the state court ruled pursuant "to settled California law," App. 2, and not as a matter of federal law--certiorari should be denied. *Adams* v. *Robertson*, 520 U.S. 83, 137 L.Ed.2d 203, 117 S.Ct. 1028 (1997).

2. 28 U.S.C. §1257(a) Requires A Judgment From The Highest State Court In Which A Decision Could Be Had

This Court's certiorari jurisdiction over Kozinski's case requires a judgment by the highest California court that could have decided his appeal. 28 U.S.C. §1257(a). After the Appellate Division of the Superior Court affirmed his conviction of the infraction, Kozinski could have, but did not, seek "further review . . . by a discretionary transfer under rule 62(a) of the California Rules of Court," *People* v. *Gonzalez*, 12 Cal.4th 804, 825 (1996).

> "Thus, following an appeal as of right from a municipal or justice court to the appellate department of the superior court [citations], a further appeal might be taken to, and granted in its discretion by, the Court of Appeal as necessary to address important questions of law or to settle conflicts in the decisions of lower courts." *Snukal* v. *Flightways Mfg., Inc.*, 23 Cal.4th 754, 771 (2000).

See Cal. Const., art. 6, §11; Cal. Code Civ. Proc., §911; Cal. Rules of Court, rules 62, 63; cf. *Newhouse* v. *Misterly*, 415 F.2d 514, 516 (9th Cir. 1969).

Accordingly, Kozinski could have applied to the Appellate Division of the Superior Court to certify that transfer of his case to California's higher Court of Appeal appeared "necessary to secure uniformity of decision or to settle important questions of law," Cal. Rules of Court, rule 63(a). See, *id.*, rules 62, 63. The

Court of Appeal could have ordered the transfer to it of Kozinski's case upon such a certification. *Id.*, rule 62(a). Since Kozinski failed to apply for certification, he has not established that the judgment against him was "by the highest court of a State in which a decision could be had," *ibid.*, and, as a result, the Court lacks certiorari jurisdiction over his case. Cf. *Gotthilf* v. *Sills*, 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187 (1963).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amend.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. §1257(a)

"(a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in

other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.

"(b) Except as provided in subdivision (a), the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute.

"(c) . . . ." Cal. Constitution, art. 6, §11.

"A court of appeal may order any case on appeal to a superior court in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the court of appeal determines, that the transfer appears necessary to secure uniformity of decision or to settle important questions of law. . . . A court to which any case is transferred pursuant to this section shall have similar power to review any matter and make orders and judgments as the appellate division of the superior court would have in the case, ..." Cal. Code of Civil Procedure Ann. §911 (West Supp. 2001).

"Notwithstanding any other provision of law, any person convicted of an infraction may, upon a showing that payment of the total fine would pose a hardship on the defendant or his or her family, be sentenced to perform community service in lieu of the total fine that would otherwise be imposed. The defendant shall perform community service at the hourly rate applicable to community service work performed by criminal defendants. For purposes of this section, the term "total fine" means the base fine and all assessments, penalties, and additional moneys to be paid by the defendant. For purposes of this section, the hourly rate applicable to community service work by criminal defendants shall be determined by dividing the total fine by the number of hours of community service ordered by the court to be performed in lieu of the total fine." Cal. Penal Code Ann. §1209.5 (West Supp. 2001).

"Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk." Cal. Vehicle Code Ann. §21955 (West 2000).

"Except as otherwise provided in this article, it is unlawful and constitutes an infraction for any person to violate, or fail to comply with any provision of this code, or any local ordinance adopted pursuant to this code." Cal. Vehicle Code Ann. §40000.1 (West 2000).

"A pedestrian convicted of an infraction for a violation of this code or any local ordinance adopted pursuant to this code shall be punished by a fine not exceeding fifty dollars ($50)." Cal. Vehicle Code Ann. §42001(c) (West Supp. 2001).

"(a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

"(b) [Time] A transfer on certification may be ordered within 20 days after the record on transfer is filed in the Court of Appeal unless the proceedings for transfer are previously dismissed pursuant to subdivision (a) of rule 64. A transfer on the Court of Appeal's own motion, as provided in subdivision (a), may be ordered within 20 days after the receipt by the Court of Appeal of the opinion of the appellate department of the superior court bearing the notation that it is to be published.

"(c) [Order] The order granting or denying a transfer to a Court of Appeal shall be filed with the clerk of the Court of Appeal, and if no order is made within the time specified in this rule, the transfer shall be deemed denied and the clerk shall enter a notation in the register to that effect.

"(d) [Oral argument] Unless oral argument is waived, the case shall be placed on the calendar when the transfer is ordered.

"(e) [Notice of order] As soon as an order of transfer is filed, the clerk shall transmit a certified copy thereof to the clerk of the superior court and shall mail to each party, and to the Attorney General in a criminal case, a notice stating that such order has been filed, the date of oral argument, and when briefs are permitted, the time for filing briefs as provided in rule 65. Upon denial of a transfer on certification, the clerk shall return the record on transfer and any exhibits to the clerk of the superior court and shall mail notice of the denial to each party and, in a criminal case, also to the Attorney General. Failure of the clerk to mail any such notice shall not affect the jurisdiction of the Court of Appeal." Cal. Rules of Court, rule 62.

"(a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. The certification may be made by a majority of the judges of the appellate department. When there was a trial in the superior court, the judge who tried the case may make the certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

"(b) [Application for certification] Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there was a trial in the superior court the application shall be served and filed at least 10 days before

expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application.

"(c) [Time] The certification of a case in which there is no trial in the superior court shall be filed with the clerk of that court at any time after the record on appeal and the briefs, if any, are filed in the superior court and not later than 10 days after the judgment on appeal becomes final as to that court. The certification of a case in which there was a trial in the superior court shall be filed within 30 days after entry of the judgment or 15 days after service of written notice of entry of the judgment, whichever is earlier, in a civil case, or within 15 days after rendition of the judgment in a criminal case, unless the time is extended as provided in subdivision (d) of this rule.

"(d) [Extension of time] The time for filing the certification of a case shall be extended by new trial proceedings or proceedings to vacate a judgment in the same manner, to the same extent, and for the same period as the time for filing notice of appeal is extended by such proceedings pursuant to rule 3 of the Rules on Appeal.

"(e) [Contents] The certification shall contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the conflict, if there is no written opinion by the superior court) or important question of law to be settled and shall state whether there was a judgment in the superior court, and, if so, the nature and the date thereof.

"(f) [Transmission] Upon the filing of the certification the clerk of the superior court shall forthwith transmit a certified copy thereof to the clerk of the Court of Appeal and shall mail notice of such certification to each of the parties and also to the Attorney General in a criminal case." Cal. Rules of Court, rule 63.

STATEMENT OF THE CASE AND FACTS

On October 31, 2000, a judge of the Superior Court of the State of California,[1] Los Angeles County, convicted Kozinski of violating California Vehicle Code section 21955, an infraction. App. 2. For the offense, the trial court, the Honorable Laura C. Ellison, Judge, presiding, imposed a total of $77 as a fine and penalty assessment. Petn. 4; App. 9. Kozinski appealed to the Appellate Division of the Superior Court.

The Appellate Division affirmed the conviction on May 2, 2001, App. 4, and on May 31 denied Kozinski's petition for a rehearing, App. 6. Kozinski petitioned this court for a writ of certiorari on August 28, 2001.

Evidently, no prosecutor appeared at Kozinski's trial. App. 2-3.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied for the reasons stated above relating to the Court's jurisdiction as set forth in 28 United States Code, section 1257(a). See 1-3, *ante*. In addition, the writ should be denied because Kozinski has failed to show that the prosecutor's absence from the trial of Kozinski's infraction denied him the due process guaranteed under the 14th Amendment.

In *People v. Carlucci*, *supra*, 23 Cal.3d at 258, the California Supreme Court concluded "the absence of a prosecuting attorney at the trial of an infraction offense does not result in a per se deprivation of a defendant's right of due process and fair trial." The court explained:

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1. The minute order in the appendix bears the title of the South Bay Judicial District of the Los Angeles County Municipal Court. However, in Los Angeles County, the municipal courts were merged into the superior court on January 22, 2000.

"Any requirement that a prosecutor be present would . . . seem contrary to the best interests of the defendant. Even in the most aggravated infraction case the potential financial penalty rarely, if ever, would equal the cost to the defendant of employing counsel and most defendants, therefore, would decline to hire counsel. If a prosecutor were required to participate in infraction hearings, the unrepresented defendant would find himself in opposition to a professional adversary, hardly to defendant's advantage.

"In the absence of a prosecuting attorney the citing officer routinely takes the stand and gives a narrative description of the events leading to the issuance of the citation. The defendant will then have full opportunity to cross-examine the officer and then may himself testify, and present such other evidence as may be probative and relevant. Under these circumstances we are satisfied that a trial judge should, within proper limits, be permitted to ask questions for the purpose of clarifying ambiguities and to insure that justice is done both to the accused and to the People, all this without jeopardizing the court's ability to act in a judicious, independent, detached, and neutral manner.

"In approving this practice, however, we caution that the trial court must not undertake the role of either prosecutor or defense counsel. We have recognized that "It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the ***appearance*** of impropriety." [Citation.] It is fundamental that the trial court in the conduct of infraction hearings must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias." *Ibid*.

Other courts have found that conclusion sound, see, e.g., *In re Grand Jury Proceedings*, 875 F.2d 927, 934 (1st Cir. 1989); *State* v. *Avena*, 281 N.J.Super. 327, 338-339, 657 A.2d 883, 889 (1995), and the meager facts in this record justify their assessment. Kozinski was charged, tried and convicted on a jaywalking charge. Upon conviction he could be punished with a maximum fine of $50 and no jail confinement. Cal. Vehicle Code, §42001(c); see also Cal. Penal Code, §1209.5 (community service in lieu of fines for infractions). Here, Kozinski's fine and added penalty assessment totaled only $77. No lawyer represented him in the state trial court. Had the prosecutor appeared to present the case against him, Kozinski would have been at an added disadvantage. If a prosecutor had to be present in such a case, the costs to the state and local government might result in the Legislature's imposition of higher fines and penalty assessments to offset the increased cost of running the traffic court. Cf. Petn. p. 24, n. 9.

To the extent the cases Kozinski would use in support of his argument rely upon notions of federal due process, they are consistent with the conclusion of the California Supreme Court in *People* v. *Carlucci*, *supra*. In one of them, *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (1st Cir. 1966), the Court of Appeals held that a misdemeanor trial required a prosecutor where the court had sentenced the defendant to jail and the defendant had counsel during the trial. The federal appellate court believed that where the defendant had counsel the judge would be impelled to keep the balance true by acting like a prosecutor. *Id.* at 719-720. Here, Kozinski faced neither a jail sentence nor a misdemeanor conviction and, as noted, had no counsel at his trial. A Ninth Circuit case he discusses, *F.J. Hanshaw Enterprises, Inc.* v. *Emerald River Development, Inc.*, 244 F.3d 1128 (9th Cir. 2001), involved the imposition of hundreds of thousands of dollars in a judicial sanction and appears to limit its holding to cases "where serious criminal penalties are at stake," *id.* at 1140, specifically, those involving monetary sanctions of $5000 or more, *id.* at 1139-1140, n. 10.

Kozinski faced no such "serious criminal penalties," *id.* at 1140. Because of the minor nature of the offense and penalty here, any imagined adversity suffered by Kozinski in not having a prosecutor present at his trial for jaywalking was "'outweighed by the benefits that result from speedy and inexpensive nonjury adjudications,'" *Blanton* v. *City of North Las Vegas, Nev.*, 489 U.S. 538, 543, 103 L.Ed.2d 550, 109 S.Ct. 1289 (1989), quoting from *Baldwin* v. *New York*, 399 U.S. 66, 73, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970).

There may be occasions when it will be helpful and even necessary for the prosecutor to participate in the trial of a traffic infraction, such as, when the defendant appears with counsel, cf. *Figueroa Ruiz* v. *Delgado*, *supra*, 395 F.2d at 719-720, or when the trial court otherwise determines that it cannot confine itself to the traditional judicial role without the prosecutor's participation, see *People* v. *Carlucci*, *supra*, 23 Cal.3d at 258. But Kozinski's arguments do not establish a per se violation of due process every time a court tries an infraction without a prosecutor.

CONCLUSION

For the reasons stated, the Court should deny Kozinski's petition for writ of certiorari.

Respectfully submitted,

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